

clusions² and to adopt the recommended Order as modified.³

ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

¹ We make the following corrections to the judge's decision which do not affect the result in the case. The dates of October 10, 1992, and April 17 and June 6, 1993, refer to union meetings and not union leafleting. The record does not establish that Arden Sueberling was the office manager in 1992. Rick Arnold did not sign an affidavit for the General Counsel before the hearing. Investigator John Hemenway did not testify that he prepared the logs of his fellow agents.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2 In adopting the judge's conclusion that the Respondent was responsible for the statements of Kevin Sueberling, we rely only on the judge's finding that Sueberling as inbound planner was an agent of the Respondent. The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988). The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 427 (1987).

In this case, Kevin Sueberling as inbound planner decided the freight loading and arranged the driver routes; directed drivers and dockworkers which freight to move and in what fashion to do so to avoid damage; resolved freight loading problems and redirected drivers in their assignments as needed including adjustment of work hours. Sueberling as inbound planner attended management meetings, evaluated employees, worked as dispatcher on a fill-in basis, was salaried, and was the only one with this status on duty at night. In these circumstances, it is evident that the employees would reasonably believe that Sueberling as inbound planner was reflecting company policy and acting for management when he made the statements at issue. Thus, we find that Kevin Sueberling as inbound planner

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pitt Ohio Express, Inc., Norristown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following paragraphs 2(a) and (b) for 2(a) in the judge's Order, and reletter the subsequent paragraphs.

“(a) Within 14 days from the date of this Order, offer Kenneth Kern and Edward M. Gall full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

“(b) Make Kenneth Kern and Edward M. Gall whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.”

2. Substitute the following for relettered paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its facility in Norristown, Pennsylvania, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 1995.”

3. Substitute the attached notice for that of the administrative law judge.

ner acted as an agent of the Respondent with respect to that conduct and that his acts are attributable to the Respondent.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or terminate employees because they engaged in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Kenneth Kern and Edward M. Gall full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kenneth Kern and Edward M. Gall whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Kenneth Kern and Edward M. Gall, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

PITT OHIO EXPRESS, INC.

Elana R. Hollo, Esq., for the General Counsel.

Joseph M. Maurizi, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

Adam H. Feinstein, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. I heard the case February 14-21, 1996, in Philadelphia, Pennsylvania, on a consolidated complaint issued July 31, 1995, which alleges the Respondent fired employees Kenneth Kern and

Edward M. Gall because of their support for Teamsters Local Union 676, International Brotherhood of Teamsters, AFL-CIO (Local 676) thereby violating Section 8(a)(3) and (1) of the Act.

Based on the entire record, the corrected transcript,¹ briefs by the parties, as well as witness demeanor, I make the following.

I. JURISDICTION

The Respondent runs a trucking company headquartered in Pittsburgh and maintains a terminal at Norristown, Pennsylvania, the location involved here, as well as terminals in Ohio, Maryland, and West Virginia. Its answer admits complaint allegations establishing Board jurisdiction and I so find. Further I find that Local 676 is a labor organization as defined in the Act.

II. THE UNFAIR LABOR PRACTICES

A. Union Activity

The Respondent's employees work as truckdrivers delivering freight and on the terminal docks. There are 50-55 drivers. Employees are unrepresented. Edward Gall began work there in 1990, Kenneth Kern in 1985. The Respondent's customers submitted letters to the Respondent on numerous occasions during Gall's tenure praising Gall's work. The Respondent itself congratulates Gall on his selection as one among only four employees at the terminal elected to its safety committee. Kern works for the Respondent 10 years as a driver, and also as a dispatcher and in the Respondent's office. He also serves on the safety committee and receives safety awards. His disciplinary record for 6 or 7 years in this period is excellent; the record is clean of serious writeups for any infractions, any days off, or disciplinary problems. His relationship with Kevin Sueberling who serves as inbound planner and later operations manager is a good one until events described below.

The Union conducts an organizing drive at the terminal entrance in August 1992 after employees ask union organizer Art Carlson, also a shop steward driving for another company for help to improve working conditions, in particular productivity standards, there being substantial unrest among drivers arising from overly tight delivery times and too many assignments to complete within the time allotted, sometimes forcing missed lunches. Carlson and another organizer leaflet employees on August 31, 1992, wearing attire plainly marked with union identification positioned within clear view of the terminal offices closely nearby. Police arrive, tell Carlson that someone in the terminal called, but leave shortly after Carlson informs them of the organizing intentions. About 43 employees stop and accept literature.

The Union leaflets the terminal September 21, October 10, and in November 1992; and spring 1993 on April 17, and June 6 as well as two or three times more. Carlson recalls he also leafleted at the terminal in December 1994, and that in 1995 Gall and Kern asked Carlson to revitalize the union organizing campaign efforts further in a phone call and dur-

¹ The General Counsel's appropriate motion to correct the transcript is granted. Sua sponte the misquoted attribution of "honey" is corrected to "huh?" at p. 731 in the record.

ing a meeting with him in a local eatery, urging him to continue leafleting.

Kern, prior to the union campaign, spoke with a third of his coworkers in the summer of 1992 addressing concerns about not getting lunch, long hours, and seniority, leading to the effort to contact the Union. Gall spoke with about 10 to 15 employees concerning lunches and the number of truck stops creating unsatisfactory working conditions. He took notices of union meetings and union cards from the union representatives out handbilling. Gall attended several union meetings with other employees and signed authorization cards, in October 1992, and again in September 1994. Gall distributed over 10 union authorization cards to other employees. Kern handed out union cards to about 10 employees, recalling specifically that he continued to do so in 1995, answering employee questions with Carlson's help in the form of telephoned advice and at meetings. In February 1994 or late spring or summer, both Kern and Gall become members of the inside house union organizing committee with three other employees and take part actively in the ongoing campaign—literature and union cards are distributed and meetings with employees every 5 to 6 weeks together with phone contacts with Carlson continue devoted to organizing efforts into March 1995 when further such efforts cease.

B. Respondent's Knowledge and Animus

The Respondent concedes knowledge that an ongoing campaign by the Union to organize its Norristown terminal employees is underway during the period described, and the record establishes that the Respondent knows especially that Kern and Gall figure prominently as supporters in that effort.

In October 1994 as Kern walks across the loading dock, Operations Manager Kevin Sueberling projects a snickering-like grin in his direction and tells him he intends to make Kern his new local man—running local routes only. When Kern asks why the downward assignment, Sueberling tells him he is a bad influence on the other drivers, that Kern is trying to bring a union in, and if they bring the Union in Kern is not going to have a job. Since the respondent counsel continuously fed Sueberling leading questions as to the encounter so that Sueberling's denials are not his own and thus are unreliable, Kern's straightforward account is credited.

In August 1992 Sueberling, then an inbound planner, tells Gall on the dock that they'd shut the place down if the Union gets in and that before that happened he'd get rid of him. He first tells the employee he knows that he stopped and took some literature from Teamster Organizer Carlson. Sueberling went on to say he saw Gall take something from Carlson in 1992; that he saw him stop with the union guy out there and said, "I'll get rid of you, you're taking literature." Prior to the first union meeting in October 1992 Sueberling told Gall someone from the Company would be there to see who attended, while Gall ate lunch in the lunch room—Sueberling saying he knew a meeting was going on. Gall's account is credited. Further, Sueberling is invested with considerable authority and managerial representative-like authority as an inbound planner at the time described. He is terminal manager from 1988 until 1990 when demoted to dockman, then advanced to planner in 1990, the only one with this status on duty at night. He sorted 4 to 5 hundred bills of lading, matching drivers' paperwork and arranged

driver runs, deciding the loading and arranging driver routes. He decided which merchandise went on which truck to keep driver work efficient. He directed drivers and dockworkers which freight to move and in what fashion to do so to avoid damage. He resolved freight loading problems and redirected drivers in their assignments as needed including adjustment of work hours, attended meetings of management, evaluated employees, worked as dispatcher on a fill-in basis and was salaried. He is again made operations manager in 1994. He clearly bore the indicia of supervisory authority at the time described in 1992 and is found to be a supervisor as defined in the Act. *Clark Machine Corp.*, 308 NLRB 555 (1992). Moreover, I conclude in any event that he acted as an agent of the Respondent, armed as he was then, with apparent authority to serve in such capacity. *Great American Products*, 312 NLRB 962, 963 (1993). Kern is targeted by Kevin Sueberling's wife, Arden Sueberling, then the Respondent's office manager also serving as the administrative assistant to the terminal manager, in 1992 as a knowledgeable source of information concerning employees' union activities when she questions Kern during a telephone call he makes, asking Kern who attended a union meeting the previous Saturday. She names a few employees specifically and asks if they were present. Kern denied knowledge and informs fellow employees about her inquiry.

When Gall and Sueberling are observing Carlson on two occasions in August 1992 the latter twice deprecates the organizer—then passing out union literature near the terminal—telling Gall, "The local Teamsters are outside. Look how fat he is, he's lazy that's all Teamsters are, they're all fat and lazy," and on the second occasion, "There goes that Teamster bum again, look how fat he is." This is not an isolated disparagement by the Respondent of its employees' chosen contact with the Union in their efforts seeking representation. The first time union organizer Carlson stood near the Respondent's terminal passing out leaflets to employees, in August 1992 then Terminal Manager Mike Donovan standing outside on a corner of the terminal directly facing Carlson cast an obscene fingered gesture towards him, repeating the insulting conduct towards Carlson again on September 21, 1992. In August 1992 Donovan told drivers on the dock during the Union's leafleting that he'd rather not see employees stop (to take any literature), and a day or two later Kevin Sueberling while standing on the dock with Bill Woosnam, a driver employed in 1992, asked him why he would want a union at Pitt Ohio Express. Sueberling's wife, Arden Sueberling, questioned Woosnam later that same day asking him why he would want a union.

C. The Alleged Cause for Discharge

The Respondent's vice president, Ronald Ciotti, and a company owner, Ron Uriah, made the decision to fire the employees, first suspending them on March 20 then discharging them March 23, 1995. Ciotti says at one point in testimony that the reason is intimidation, harassment, and promotion of a work slowdown, primarily. He says he felt the two cushioned their runs and harassed other drivers to "protect" the runs by urging they not complete such runs too quickly, yet states incongruously that taking too long at their stops was not a primary problem with Gall and Kern. Manifestly, if the two drivers didn't take too long to perform their runs the fact that they may (or may not have) urged others

who occasionally drove their routes not to exceed their times does no harm to anyone. When Kern presses Terminal Manager William Gehringer for specifics regarding the discharge, when Gehringer calls him at home to fire him March 23 denying the Respondent's allegation, Gehringer replies, "Well Ken, it was other things." Neither Kern nor Gall got any specifics though they requested the basis for the actions. At the hearing moreover, the Respondent through counsel, added to the cause for discharge a further new basis alleging that the employees falsified their entries on manifests to relate times not "actually where they were." This fresh assertion also is not provided the employees at the time of their discharges. Moreover, the record supports the finding that the Respondent never counseled or warned Kern or Gall about such alleged misconduct though affording counseling to other employees for infractions of company rules or policies.

Ciotti testifies he still doesn't have a clue why the retention of employees is a problem at this terminal, yet the record shows widespread unrest and verbal sparring among drivers forced to forego lunch and hurry their runs due to tight scheduling; further, this condition is ascribed by him as the Respondent's inability to put employees on quick enough to satisfy customers. Thus, the record describes drivers almost routinely and with avid interest checking the time records of coemployee drivers daily after completion of runs to see where they stand less they underperform. Among so large a group it is not uncommon for there to be friction arising from a perceived need by employees to lessen hardships and "protect" the need for lunch or enhance safety—both Kern and Gall are members of the safety committee—by urging a more careful pace and by calibrating their times to meet delays in call-ins due to busy signals or being on hold for reasons beyond their control, which happened daily. In context, reports from 3 employees out of 50–55 drivers concerning such appeals by Kern and Gall allegedly made to the Respondent pale into insignificance.

Thus, the Respondent put driver Becker on the stand to say Gall told him "to slow down in July 1994, he was going too fast on Kern's run and that on a later date Kern would punch him for [screwing] up his route." Becker admitted he had caused accidents in the past but said he didn't believe Gall and Kern made the remarks out of safety concerns. He also said he didn't know the many years long union campaign was underway yet knew about the union leafleting. He testifies that "all the drivers look at others' pickup and delivery sheets." Both Kern and Gall deny the attribution by Gall that Kern would punch Becker at some undisclosed time or at any time and the alleged remark—a third hand hypothetical or prediction at best does not come to pass. Richard Arnold, a driver, testified for the Respondent that in a warmer month after a February Gall told him to mark 15 minutes at a stop and on another occasion in March, June, or July 1994 Gall tells him after looking at his times not to mess with another driver's run or he'd be in trouble. On further examination, Arnold admits he signs an affidavit for General Counsel before the hearing wherein he testifies he had no problem with Gall and had never voiced any complaints regarding him when management approached him. He says he refused to sign the affidavit because Terminal Manager William Gehringer told him not to do so, and he retracts the statement. He admits he harbors antiunion sentiments, does not care for unions, and wouldn't want to work in a place

with one. He says he gave the statement because he thought the Board agent taking it on the phone—though identified to him and easy to trace—is a wife of Gall or Kern and he wanted to see what "they" asked. His account is deemed unreliable given his bias and fancifully based retraction and Gall's denial is credited. The only other employee called by the Respondent to support alleged harassment and run protection is Barry Hess who testifies he imagines he spoke with Gall on the dock who told him the size of the runs are too big, to do whatever he can do in a day, and bring the rest of the stops back. Hess' account of three discussions with Gehringer reporting this occurrence is denied by the latter. Hess is fed leading questions throughout. Hess testifies that other employees like Gall, voiced deprecating remarks towards Pitt Ohio based on the same scheduling hardships.

Finally, the Respondent asserts that it conducted a long investigation which Ciotti said he could not recall the Company ever doing at Norristown by hiring a former FBI agent to conduct surveillance of Kern and Gall by video-taping the two during their runs. The ex-FBI agent conducted the surveillance with other agents so that they made separate video recordings of the employees. The other agents are not put on the stand to authenticate the tapes they made during this period. The first ex-agent, John Hemenway, admits the tapes are out of his possession for close to a year. Since there is no basis made or offered by which the tapes can be authenticated they are rejected at the hearing. Furthermore, while the logs of surveillance are received, Hemenway testified he prepared the logs of his fellow agents without consulting with his associates beforehand; therefore I find the logs lack firsthand reliability and do not take their contents into account. In any event the record shows that the tapes contain shifting inaccuracies throughout the day that don't benefit either party; sometimes the agents' clocks are admittedly inaccurate or fail to have been calibrated to a specific location or synchronized with other agents' timepieces, and that there is no evidence of time being piled up—no more than a few moments. Ciotti's unsubstantiated account that the surveillance tapes showed efforts to cushion certain runs is therefore discounted.

The record shows that Kern and Gall engaged in discussions about the general terms and conditions of employment aptly described on brief by the General Counsel as routine shop talk. The fact that their versions of events is not sought before the discharges is a basis to infer the Respondent seized on its own concoction as a pretext for discharging them. The fact that it denied any information to the previously trusted, long term excellent workers and discharged them without warning or without imposing a lesser form of discipline raises even more suspicions regarding the bona fides of the Respondent's action. The multiple causes assigned to the discharges raise the doubts higher as such warrants the belief the Respondent scraped the barrel for reasons beyond the true reason to buttress its case. Further, the unpersuasive nature of the assigned reasons behind the discharge—the capital punishment of industrial relations rather than a lesser discipline—adds support to the complaint allegation of wrongdoing by the Respondent. Strikingly significant is the failure by any of the Respondent's officials, if they actually believed this is true, to call Kern and Gall on the carpet for their alleged wrongdoing and inform them of its consequences beforehand; or to disclose the so-called in-

vestigation results and provide an opportunity for them to respond. Given the proof that the two drivers engaged in activities in support of the Union with the Respondent's specific knowledge and demonstrated animus arising from those actions together with its multiple, unpersuasive, and unproven alleged reasons for their discharge, I find that the General Counsel establishes a prima facie case in support of the complaint allegation that the discharges violated Section 8(a)(3) and (1) in the Act. The burden of proof then shifts to the Respondent to prove that it would have discharged Kern and Gall even aside for reasons associated with their activities in support of the Union, and this it does not do. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) when it discharged Kern and Gall.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order the Respondent to reinstate Kern and Gall to their former positions or if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of wages and benefits they may have suffered by reason of the Respondent's discharges of them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Pitt Ohio Express, Inc., Norristown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees because of their union activities.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Kenneth Kern and Edward Gall full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, expunge from its records any reference to their suspension and discharge and notify the employees of the expunction in writing that this has been done and that the discharges and suspensions will not be used against them in any way within 3 days thereafter.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Norristown, Pennsylvania, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.⁴

³If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁴See *Indian Hills Care Center*, 321 NLRB 144 (1996).